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No. 82-772

In the Supreme Court of the United States

OCTOBER TERM, 1982

HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Federal Communications Commission's decision denying petitioner's application for reclassification of its radio station's status from Class II-A to Class I-A is an exercise of the Commission's licensing authority, and is therefore reviewable exclusively in the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b).

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1. This case involves a controversy that began in 1941 and that has been litigated before the Federal Communications Commission and the courts almost continuously ever since (Pet. App. 9a). The dispute centers on which of two radio stations licensed by the Commission to operate on the clear channel frequency 770 kHz will be the dominant station.[1]

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[1]Since 1941, radio station WABC in New York City has been permitted to operate as the dominant, or Class I-A, station on 770 kHz. Radio station KOB in Albuquerque, New Mexico, licensed to petitioner Hubbard Broadcasting Co., has been required to operate on the frequency as the non-dominant, or Class II-A, station. The result has been to afford WABC's signal a much greater area of coverage than KOB's. The Commission order contains a brief explanation of "clear channels" in the radio broadcast service. See Pet. App. 8a & n.1; see also Pet. 3-4. In addition to the decisions cited in the text, the extensive background of this controversy is set out in: *American Broadcasting Co. v. FCC*,

After extensive rulemaking proceedings, the Commission in 1976 permanently assigned the Class I-A channel to New York City and the Class II-A channel to New Mexico. *In re Clear Channel Broadcasting, KOB/WABC*, 59 F.C.C.2d 32 (1976). This case represents petitioner's third challenge to that decision by the Commission. In 1977 the United States Court of Appeals for the District of Columbia Circuit affirmed without opinion the Commission's 1976 rulemaking decision. *Hubbard Broadcasting, Inc.* v. *FCC*, 564 F.2d 600, cert. denied, 435 U.S. 968 (1978). In 1980 the same court summarily affirmed the Commission's rejection of petitioner's application to operate as a Class I-A station in New Mexico because the application was inconsistent with the Commission's 1976 decision. *Hubbard Broadcasting, Inc.* v. *FCC*, 663 F.2d 220.

Less than three months after the District of Columbia Circuit's second *Hubbard* decision, petitioner once again applied to the Commission for a permit to operate as a Class I-A station in New Mexico. Its application was accompanied by requests that the Commission waive or change the 1976 rule assigning the Class I-A station to New York. The Commission dismissed all of those applications because it and the court of appeals had repeatedly addressed the relevant issues and because petitioner had offered no new grounds to warrant reexamination of those earlier conclusions (Pet. App. 7a).

For the third time petitioner sought judicial review—this time in the United States Court of Appeals for the Eighth

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191 F.2d 492 (D.C. Cir. 1951); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 14 Rad. Reg. (P & F) 2020 (D.C. Cir. Sept. 27, 1956); *In re Albuquerque Broadcasting Co.*, 25 F.C.C. 683 (1958), aff'd, *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 280 F. 2d 631 (D.C. Cir. 1960); *In re Hubbard Broadcasting, Inc.*, 35 F.C.C. 36 (1963), rev'd, *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 345 F.2d 954 (D.C. Cir. 1965), cert. denied, 383 U.S. 906 (1966).

Circuit. That court held that it was without jurisdiction. It concluded that the FCC's action "was, as a matter of substance, the exercise by FCC of its 'radio-licensing power,' " and therefore reviewable exclusively in the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b). The court held that

> to permit Hubbard to split off a part of the "package" [of a license application and petition for rule change] in a transparent attempt to obtain jurisdiction in a forum other than the Court of Appeals for the District of Columbia, which has twice ruled against reclassifying KOB and WABC as directionalized stations on 770 kHz, would frustrate the clear intent of Congress that judicial review of all cases involving FCC's "radio-licensing power" be limited to the United States Court of Appeals for the District of Columbia.

(Pet. App. 5a). Accordingly, the court dismissed the petition for want of jurisdiction.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petition presents no question that warrants this Court's review.[2]

Section 402 of the Communications Act of 1934, 47 U.S.C. 402, provides two paths for judicial review of FCC actions. Section 402(b) confers exclusive jurisdiction on the

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[2]Respondent United States took no position below on the court's jurisdiction, but fully supported the Commission on the merits. The United States continues to take no position on the jurisdictional issue. But, believing that petitioner's case in the court of appeals was insubstantial on the merits and that the jurisdictional issue presented by the unusual circumstances of this case does not in any event warrant review by this Court, the United States agrees with the Commission that the petition should be denied.

United States Court of Appeals for the District of Columbia Circuit over appeals from decisions and orders of the FCC in eight categories of cases associated with the Commission's licensing powers. Section 402(a) provides that proceedings to review all other Commission orders shall be brought in the various courts of appeals under the normal rules of venue specified in 28 U.S.C. 2342(1) and 2343.

In 1952 Congress amended Section 402(b) to "make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to [the Court of Appeals for the District of Columbia]." S. Rep. No. 44, 82d Cong., 1st Sess. 11 (1951). See Pub. L. No. 554, ch. 879, 66 Stat. 718-719. The courts of appeals have refused to read Section 402(b) in a manner that would conflict with this purpose. Instead, as the opinion below recognized (Pet. App. 4a), they have required orders to be appealed to the District of Columbia Circuit under Section 402(b) whenever they bear a "close functional similarity" to orders specifically appealable under Section 402(b),[3] or are "ancillary" to,[4] "in aid of,"[5] or "intimately associated with"[6] the exercise of the FCC's licensing power. In so applying the statute, the courts of appeals, including the court below (Pet. App. 5a), have followed this Court's holding that in applying Section 402 of the Act, it is necessary to look to "the substance of what the Commission has purported to do and has done." *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942).

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[3] *Metropolitan Television Co.* v. *United States*, 221 F.2d 879, 880 (D.C. Cir. 1955).

[4] *Helena TV, Inc.* v. *FCC*, 269 F.2d 30 (9th Cir. 1959); *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962); *National Association of Broadcasters* v. *FCC*, 554 F.2d 1118, 1121 n.1 (D.C. Cir. 1976).

[5] *Cook, Inc.* v. *United States*, 394 F.2d 84, 87 (7th Cir. 1968).

[6] *WHDH, Inc.* v. *United States*, 457 F.2d 559, 561 (1st Cir. 1972).

Petitioner acknowledges (Pet. 8) that the Commission's dismissal of its application to modify its station's license was appealable only to the District of Columbia Circuit under Section 402(b). However, it contends that the petition to amend the Commission's rule that prevented the grant of its station application was a "wholly independent" matter (Pet. 9) and thus reviewable under 47 U.S.C. 402(a) in other circuits. This argument is erroneous.

As the Commission pointed out in its decision, the rule change that petitioner sought "would only apply to station KOB" (Pet. App. 8a n.2). The Commission thus treated the rulemaking petition and the license application, which was accompanied by a request for a waiver of the rule, as "functionally equivalent" and therefore part of a single package (*ibid.*). In this it was correct. The sole purpose of the rule change (or waiver) sought by petitioner was to enable it to become the licensee of a clear channel station in New Mexico. And, therefore, the effect of the jurisdictional splitting sought by petitioner would in substance be to give it a third crack at a license in a forum other than the one exclusively authorized to review licensing decisions and that—not coincidentally—has twice rejected petitioner's claims to such a license.

The court of appeals agreed with the Commission's description of the petition and application as "inextricably interwined" (Pet. App. 2a) and properly rejected petitioner's attempt "to split off a part of the 'package' [because it was] * * * a transparent attempt to obtain jurisdiction in a forum other than" the Court of Appeals for the District of Columbia Circuit, in contravention of Congress' clear intent to confine judicial review of all cases involving the FCC's "radio-licensing power" to that circuit (Pet. App. 5a).

The court of appeals' interpretation of Section 402(b) is explicitly grounded on and fully consistent with the interpretation of the statute articulated by every court of appeals that has addressed the question (see notes 3-6, *supra*) and by this Court (see *FCC* v. *Columbia Broadcasting System*, 311 U.S. 132, 134 (1940); *Columbia Broadcasting System* v. *United States*, *supra*; *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6-9 (1942)).[7] Its decision was, further, made in a case that had twice been fully considered on the merits by the United States Court of Appeals for the District of Columbia Circuit. Review by this Court therefore is unnecessary.

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[7]The decisions of the Seventh Circuit in *Campos* v. *FCC*, 650 F.2d 890 (7th Cir. 1981), and of the Third Circuit in *New Jersey Coalition for Fair Broadcasting* v. *FCC*, 574 F.2d 1119 (3d Cir. 1978), upon which petitioner relies in asserting a conflict among the circuits (Pet. 11-12), do not support its position. *Campos* concerned an FCC decision effectively denying an application for a radio operator's license. The court noted that seven of the eight categories in Section 402(b) refer to orders granting, denying, modifying, or revoking construction permits and station licenses, not operator's licenses. The eighth refers to orders *suspending* an operator's license, but not those denying an application for such a license. The court therefore held that orders of the latter type were reviewable pursuant to Section 402(a). 650 F.2d at 892-893. The instant case, by contrast, involves two "inextricably intertwined" FCC actions, one of which is specifically enumerated as appealable only under Section 402(b) (i.e., denial of the station license application) and the other of which is functionally equivalent in the circumstances of this case (i.e., dismissal of the rulemaking petition that would have amended a rule applicable only to the KOB-WABC controversy).

The *New Jersey Coalition* decision did not discuss the jurisdictional question. In any event, unlike the instant case, in which petitioner sought an agency rule change affecting only these two radio stations, *New Jersey Coalition* arose from a generalized FCC inquiry into the needs of the state of New Jersey for television service. 574 F.2d at 1121.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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